**Before the**
**FEDERAL COMMUNICATIONS COMMISSION**
**Washington, D.C. 20554**

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| In the Matter of | ) | |
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| Acceleration of Broadband Deployment by Improving Wireless Siting Policies | ) | WT Docket No. 13-238 |
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| Acceleration of Broadband Deployment: Expanding the Reach and Reducing the Cost of Broadband Deployment by Improving Policies Regarding Public Rights of Way and Wireless Facilities Siting | ) | WC Docket No. 11-59 |
| | ) | |
| 2012 Biennial Review of Telecommunications Regulations | ) | WT Docket No. 13-32 |
| | ) | |

# REPLY COMMENTS OF CTIA – THE WIRELESS ASSOCIATION®


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## REPLY COMMENTS OF CTIA – THE WIRELESS ASSOCIATION®

CTIA – The Wireless Association® ("CTIA")[1] submits these reply comments regarding the Commission's *Notice of Proposed Rulemaking* proposing to simplify the wireless siting process.[2]

## SUMMARY

As discussed below, the record overwhelmingly supports exempting temporary towers from the 30-day public notice requirement associated with antenna structure registrations. Further, the record demonstrates that clarification of Section 6409(a) and the Shot Clocks is

[1] CTIA is the international organization of the wireless communications industry for both carriers and manufacturers. Membership in the organization covers Commercial Mobile Radio Service ("CMRS") providers and manufacturers, including cellular, Advanced Wireless Service, 700 MHz, broadband PCS, and ESMR, as well as providers and manufacturers of wireless data services and products.

[2] Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies, *Notice of Proposed Rulemaking*, 28 FCC Rcd 14238 (2013) ("*NPRM*"). All comments filed on or about February 3, 2014 in response to the *NPRM* will be short cited.

necessary, along with adoption of a deemed granted remedy, to eliminate uncertainty and effectuate congressional intent for faster tower siting decisions. Broad support in the record also warrants streamlining review under the National Environmental Policy Act ("NEPA") and the National Historic Preservation Act ("NHPA"), including the adoption of certain exclusions for DAS and small cells. Finally, the Commission should clarify that distributed antenna systems ("DAS") and other small cell deployments are entitled to the same expedited collocation processes as macro cells.

## DISCUSSION

### I. THE RECORD OVERWHELMINGLY SUPPORTS ADOPTION OF A TEMPORARY TOWER EXEMPTION TO THE PUBLIC NOTICE REQUIREMENTS FOR ANTENNA STRUCTURE REGISTRATIONS

CTIA urges the Commission to adopt its proposal to codify the public notice exemption for temporary towers.[3] Virtually all parties addressing the issue support adoption of the proposal.[4] The expected public interest benefits associated with the proposed exemption are substantial. The exemption will enable carriers to respond to "short-term spikes in demand (planned and unplanned)" without any adverse environmental or air safety consequences.[5] As

[3] *Id.* at ¶¶ 68-89.

[4] *See, e.g.*, CTIA Comments at 4-9; AT&T Comments at 18-20; Arkansas Historical Preservation Program Comments at 2; Joint Venture: Silicon Valley Comments at 4-5; Minneapolis Comments at 15; PCIA Comments at 59-60; Springfield Comments at 7-9; Sprint Comments at 6-7; Steel in the Air, Inc. Comments at 4; Telecommunications Industry Association Comments at 4; Utilities Telecom Council ("UTC") Comments at 9-11; Verizon and Verizon Wireless (hereinafter "Verizon") Comments at 23-25; West Palm Beach Comments at 4. The proposed exemption was categorically opposed by a single party who failed to provide any substantial reasons for rejecting the proposal. Tempe Comments at 10. The City of Tempe opposes the exclusions due to concerns over noise, fumes, and vibrations that may be caused by generators. *Id*. The FCC's existing rules already exclude these concerns, however, and Tempe provides no basis for revisiting these exclusions. *See* 47 C.F.R. §§ 1.1306, 1.1307.

[5] AT&T Comments at 19; *accord* PCIA Comments at 59; Verizon Comments at 24-25.

the record demonstrates, absent the exemption, carriers may be forced to forego deploying temporary facilities.[6]

In the nine months since the Commission temporarily waived the requirement, not a single instance of a temporary tower raising environmental or historic issues was reported. The record also demonstrates that if an extension of temporary tower authority becomes necessary, the applicant would have to make a compelling showing to support the extension.[7] The extension request should not trigger a public notice requirement for the same reasons that the original application was exempted from the public notice requirement.

The Commission should reject proposals to either arbitrarily limit (i) the number of temporary towers that can be deployed in a service area[8] or (ii) the height of temporary towers subject to the exemption.[9] Nor should the Commission specify the particular types of temporary towers that would be subject to the exemption.[10] The exemption was proposed because carriers often have to deploy temporary towers with little advance notice or to respond to unforeseen events. Placing a limit on the number of towers in a particular would be inconsistent with this underlying objective. If there is a temporary need for service, a carrier's flexibility to respond with a wide array of solutions immediately at its disposal (as long as the solution meets the

[6] *See* AT&T Comments at 20; Verizon Comments at 23.

[7] *See* CTIA Comments at 9; AT&T Comments at 20; Minneapolis Comments at 15 (recognizing the need for extensions but noting that they should not be routinely granted); Sprint Comments at 7; *but see* Steel in the Air, Inc. Comments at 4. As Sprint demonstrated, there are limited foreseeable scenarios, such as the replacement of an existing, damaged tower, where the deployment of temporary towers for longer than six months may be necessary and where public notice requirements should not apply. Sprint Comments at 7.

[8] *But see* Springfield Comments at 8-9.

[9] Mesquite, NV Comments at 2 (filed by Aaron Baker, Dec. 19, 2013) (proposing a 120 foot limit); Springfield Comments at 7-8 (suggesting a maximum height of 150 feet).

[10] AT&T Comments at 11; Verizon Comments at 25.

FCC's temporary tower eligibility criteria) should not be impeded. Only in that way can the carrier respond to the needs of the locality, local law enforcement and the public.

Similarly, there is no basis for reducing the FCC's proposed maximum height for temporary towers eligible for the exemption. The City of Mesquite, Nevada proposes a 120 foot limit without any justification.[11] The City of Springfield, Oregon suggests a 150 foot limit because "Springfield prohibits permanent tower facilities greater than 150 feet in height."[12] The temporary tower exemption, however, applies only to notification requirements under the antenna structure registration system, not local zoning requirements. Moreover, contrary to the claims of Springfield that temporary towers "are generally limited to about 100 feet,"[13] towers ranging in height from 100-199 feet are often used on a temporary basis by the wireless industry. For example, if a temporary tower is needed to replace service at a damaged 190" tower, a carrier may try to replicate the height of that tower. Forcing carriers to deploy shorter towers in such circumstances may reduce coverage thereby limiting the availability of emergency services usually available by dialing 911. Absent a compelling showing otherwise, there is no basis to constrain a carrier's ability to restore service to an area or to minimize the reliable service area of a temporary tower that is providing unique, temporary service to the public.

Finally, if a tower meets the criteria for the exemption, the exemption should apply regardless of the type of structure. Limiting the exemption to certain "types" of structures would

[11] Mesquite, NV Comments at 2.

[12] Springfield Comments at 7-8.

[13] *Id*. at 8.

have "'unintended consequences, such as inadvertently excluding new technologies or types of structures.'"[14]

## II. COMMISSION GUIDANCE REGARDING SECTION 6409(a) IS NEEDED TO PREVENT DISPUTES AND ELIMINATE UNCERTAINTY

Stakeholders in the wireless industry generally urge the Commission to clarify Section 6409(a) to remove uncertainty and to prevent efforts to eviscerate the statute.[15] Although municipalities generally claim that Commission action is unnecessary because the siting process is working well,[16] the record conclusively demonstrates the opposite – that absent Commission intervention – many municipalities intend to interpret Section 6409(a) so narrowly as to eliminate its effectiveness.[17] The record also demonstrates that, although Section 6409(a) was adopted to establish a collocation-by-right concept to facilitate wireless deployment,[18] some municipalities plan to take *more time* to review Section 6409(a) collocation requests than traditional collocation applications.[19] Commission guidance and rules are essential to

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[14] *See* CTIA Comments at 7-8 (quoting *NPRM* at ¶ 87).

[15] CTIA Comments at 9-11; ExteNet Comments at 4; Joint Venture: Silicon Valley Comments at 5-6; NY State Wireless Ass'n Comments at 1-2; PCIA Comments at 24-28; Steel in the Air, Inc. Comments at 5; Towerstream Comments at 7-10; Verizon Comments at 27; Wireless Internet Serv. Providers ("WISPA") Comments at 4.

[16] *See* Astoria Comments at 2 (filed by Paul Benoit); Colorado Communications and Utility Alliance ("CCUA") Comments at 16-19; League of California Cities Comments at 1; Salem Comments at 4.

[17] *See* Fairfax County Comments at 7; League of California Cities Comments at 2-3; CCUA Comments at 9; Tempe Comments at 11, 16; Tucson Comments at 4-5 (filed by Piroschka Glinsky); West Palm Beach Comments at 5.

[18] Section 6409(a) applies to collocations and modifications of existing structures that do not substantially change the physical dimensions of the facility. Hereinafter, the term "collocation" refers to both collocations and modifications covered by Section 6409(a).

[19] *See* League of California Cities Comments at 22; Tucson Comments at 9.

counterbalance the stated intentions of some municipalities to thwart or ignore the purpose of Section 6409(a) – to ensure that State and local authorities do not "delay collocation of, removal of, and replacement of wireless transmission equipment."[20]

### A. Section 6409(a) Simplified the Review Process

Consistent with congressional intent, and as proposed by various commenters,[21] the Commission should reduce the time for acting on collocation applications from 90 days – as currently permitted under the Shot Clock – to no more than 45 days. Congress enacted Section 6409(a) to expedite the collocation siting process, not delay it. Pursuant to Section 6409(a), a state or local government "may not deny, and shall approve, any eligible facilities request for a modification of an existing wireless tower or base station that does not substantially change the physical dimensions of such tower or base station." This test is simple and straightforward and should trigger, at most, a ministerial review at the local level.[22] With a significantly reduced level of review, there should be a concomitant shortening of the time for review.

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[20] 158 Cong. Rec. E237, E239 (Daily ed. Feb. 24, 2012) (extended remarks of Rep. Fred Upton) ("Upton Statement"); *see* Chicago Comments at 3-5 (noting that Congress clearly intended to make the collocation of wireless equipment more efficient).

[21] *See* CTIA Comments at 16-20; PCIA Comments at 46-50; Verizon Comments at 31-32.

[22] *See* CTIA Comments at 9-10; *see also* PCIA Comments at 40-44; Fibertech Comments at 31; Sprint Comments at 11; Verizon Comments at 31-32. Some parties express concern that Section 6409(a) could undermine environmental or historic protections. *See* Adirondack Council Comments at 1 (filed Jan. 13, 2014); Alexandria Comments at 60-63; American Cultural Resource Ass'n Comments at 2; Intergovernmental Advisory Committee Comments at 7-8 (filed Dec. 6, 2013); New Jersey State League of Municipalities Comments at 3-4. These concerns are unfounded, however, because Section 6409(a)(3) expressly states that "[n]othing in paragraph (1) shall be construed to relieve the Commission from the requirements of the National Historic Preservation Act or the National Environmental Policy Act of 1969."

Assertions by municipalities that Section 6409(a) created a very complicated process that requires more lengthy review than traditional collocation requests[23] – which are subject to the 90 day Shot Clock – are not credible and reflect a disregard for Congress's intent to expedite the siting process. At the time of Section 6409(a) enactment, the Collocation Shot Clock was already in place with a 90 day deadline for acting upon collocation applications. It defies logic to claim that Congress adopted Section 6409(a) to extend the time period for acting on collocation applications.

### B. The Commission Should Reject Narrow Interpretations of Section 6409(a) Terms That Would Undermine the Statute's Purpose of Speeding Wireless Deployment

Numerous narrow interpretations of key statutory terms proposed by local jurisdictions are both inconsistent with the plain language of Section 6409(a) and conclusively demonstrate that Commission clarification is essential if expeditious infrastructure deployment is not to be frustrated. For example, despite congressional intent to expedite collocations, some municipalities interpret the phrase "transmission equipment" as used in Section 6409(a) to be limited to transmit and receive antennas.[24] By restricting the definition of transmission equipment, separate serial approval processes would be imposed for other critical components of collocations – for example, backup power – because those components would be considered outside the scope of Section 6409(a). This creative interpretation effectively would gut Section 6409(a).

[23] *See* League of California Cities Comments at 21-22; New Jersey League of Municipalities Comments at 7; Tucson Comments at 8-9.

[24] *See* Fairfax County Comments at 7-8; League of California Cities Comments at 2-3; Tempe Comments at 11-12, 16; Tucson Comments at 4-5; West Palm Beach Comments at 5.

Similarly, despite the express language of Section 6409(a) which requires States and localities to approve eligible facilities requests that do not "substantially change the *physical* dimensions" of a tower or base station,[25] some municipalities claim that factors beyond the actual physical dimensions of the tower must be considered before a collocation application can be granted pursuant to Section 6409(a).[26] Some even argue that a substantial change analysis must include a subjective analysis of the visual impact.[27] Such interpretations strain the meaning of Section 6409(a) beyond reason. A clear and concise statement by the Commission indicating that a substantial change analysis refers only to a structure's physical dimensions is thus necessary to avoid disputes and time-consuming litigation over this issue.

## III. MUNICIPAL THREATS DEMONSTRATE THAT A DEEMED GRANTED APPROACH IS ESSENTIAL TO ENSURE THAT SECTION 6409(a) AND THE SHOT CLOCK PROMOTE COMPETITION

The record demonstrates the importance of a "deemed granted" approach for collocation applications submitted pursuant to Section 6409(a), as well as for siting applications subject to the Collocation and New Build Shot Clocks. The record also is littered with veiled threats from municipalities demonstrating their intent to subvert both Section 6409(a) and the Shot Clock.[28]

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[25] 47 U.S.C. § 1455(a)(1) (codifying Section 6409(a)) (emphasis added).

[26] CCUA Comments at 11-12; DC Comments at 12-15 (noting that the test for substantiality cannot be resolved by numerical rules applicable anywhere and everywhere); Eugene Comments at 11-12 (stating that a substantial change is a broader concept than an increase in tower size); League of California Cities Comments at 11-16; Missouri Municipal League Comments at 2-4 (arguing that a substantial change must be based on community standards); San Antonio Comments at 14 (stating that the question of substantiality cannot be resolved by specific percentages or size limits); Springfield Comments at 13 (same).

[27] League of California Cities Comments at 13-14; New Jersey State League of Municipalities Comments at 6.

[28] *See* Alexandria Comments at 13; CCUA Comments at 13; DC Comments at 13-15; League of California Cities Comments at 12; Piedmont Environmental Council Comments at 6.

Various municipalities and their agents have candidly voiced their displeasure with enactment of Section 6409(a). Some argue that case-by-case analysis is required for every collocation and that the review period should be extended. Some jurisdictions have openly stated that the adoption of implementing rules by the Commission will result in longer processing times for new build applications and fewer new build applications being granted.[29] In light of this staunch opposition to a functional Section 6409(a) and Shot Clock, a "deemed granted" mechanism is critical. Absent a "deemed granted" mechanism, local jurisdictions could continue to "slow roll" collocation applications secure in the knowledge that an applicant's only remedy would be a judicial one, which could take months or years to resolve.

To prevent these vindictive prognostications from becoming reality, and to effectuate Congress's mandate that States and localities approve eligible facilities requests, a deemed granted approach must be implemented. Under this approach, collocation applications subject to Section 6409(a) or the Shot Clock would be deemed granted no later than 45 days after filing.[30] New build applications should be deemed granted by the end of the 150 day Shot Clock.

A deemed granted approach is not barred by the Tenth Amendment, as some claim.[31] A deemed granted rule "would not appear to 'compel the States to enact or administer a Federal regulatory program'" and, therefore, there is no valid Tenth Amendment concern.[32] Indeed, the

[29] *See* Alexandria Comments at 13; CCUA Comments at 13; DC Comments at 13-15; League of California Cities Comments at 12; Piedmont Environmental Council Comments at 6.

[30] The 45 day period should commence once a complete application is submitted.

[31] *See* Alexandria Comments at 45-47; CCUA Comments at 15-16, 21-25; Fairfax County Comments at 18-19; League of California Cities Comments at 25-27; NATOA Comments at 8; Salem Comments at 12; San Antonio Comments at 24-25; Tucson Comments at 10; West Palm Beach Comments at 9.

[32] *NPRM* at ¶ 138 (quoting *Printz v. United States,* 521 U.S. 898, 933 (1997)); *accord* PCIA Comments at 52.

Commission has previously adopted a deemed granted approach in the cable franchising context – an approach that was upheld on appeal.[33]

## IV. THE RECORD SUPPORTS STREAMLINING NEPA AND NHPA REVIEW, INCLUDING THE ADOPTION OF CERTAIN EXCLUSIONS

### A. NEPA and NHPA Exclusions for DAS and Small Cell Deployments

The record reflects broad support for streamlining the environmental and historic review processes for DAS and small cell deployments.[34] In particular, there was strong support for excluding DAS and small cell deployments meeting specified criteria from NEPA[35] and NHPA

[33] *See, e.g., Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 5101, 5103, 5127-28, 5132, 5134-35, 5139 (2007) (providing that, if a local cable franchising authority has not made a final decision on a franchise application within the specified period, the authority will be deemed to have granted the applicant an interim franchise until it delivers a final decision), *pet. for rev. denied sub nom. Alliance for Cmty. Media v. FCC*, 529 F.3d 763 (6th Cir. 2008), *cert. denied*, 557 U.S. 904 (2009).

[34] *See* CTIA Comments at 21-22; Ass'n of American Railroads Comments at 5-8; AT&T Comments at 2-6, 10-18; Crown Castle Comments at 3-9; DC Comments at 25; ExteNet Comments at 4; Joint Venture: Silicon Valley Comments at 3-4; Mesquite, NV Comments at 1; Nat'l Conference of State Historic Preservation Officers ("NCSHPO") Comments at 1-2; Ohio Historic Preservation Office Comments at 2 (filed by Mark Epstein); PCIA Comments at 6-23; Planning Board of the Borough of Mendham Comments at 4; Qualcomm Comments at 3; Sprint Comments at 3-6; TIA Comments at 3-4; Towerstream Comments at 29-33; UTC Comments at 3-9; WISPA Comments at 12-20; Verizon Comments at 8-25.

[35] *See* Ass'n of American Railroads Comments at 9-10; AT&T Comments at 14-17; Crown Castle Comments at 5-6; ExteNet Comments at 4; Mesquite, NV Comments at 1; Sprint Comments at 3-4, 6; TIA Comments at 3-4; Towerstream Comments at 30-31; UTC Comments at 5-6; WISPA Comments at 15-17; Verizon Comments at 10.

review.[36] Given the size and placement of these facilities, the record demonstrates that there is little chance that they will have a significant adverse impact on historic resources.[37]

### B. NHPA Exclusion for Antennas Meeting Specified Criteria on Structures Older Than 45 Years

As infrastructure ages and wireless carriers seek to expand the reach and capacity of their networks, an increasing number of antennas are located on structures more than 45 years old. Minor changes to these antennas – such as replacements or the addition of antennas to existing arrays – often unnecessarily triggers historic review solely due to the age of the structure. This review process has proven to be lengthy.[38] CTIA thus supports the limited exclusion from NHPA review proposed by Verizon for antennas that would be added to structures more than 45 years old, provided certain criteria are met.[39] Under this approach, NHPA review would not be triggered by the addition of new antennas if:

- The antennas are being added in the same location as existing antennas;
- The new antennas are not visible from the ground or the height of the new antennas does not exceed the height of the existing antennas by more than 3 feet; and
- The new antennas comply with any requirements previously placed on the existing antennas based on prior NHPA review.[40]

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[36] *See* Ass'n of American Railroads Comments at 9-10; AT&T Comments at 14-17; Crown Castle Comments at 5-6; ExteNet Comments at 4; Sprint Comments at 3-4, 6; TIA Comments at 3-4; Towerstream Comments at 30-31; UTC Comments at 5-6; WISPA Comments at 15-17; Verizon Comments at 10.

[37] *See* Verizon Comments at 10; see also NCSHPO Comments at 1 (noting that small cell deployments generally should have no impact, but opposing a categorical exclusion because an adverse impact was theoretically possible); Ohio Historic Preservation Office Comments at 1-2 (same).

[38] See Verizon Comments at 17-18.

[39] *Id*. at 16-19.

[40] *Id*. at 18.

This approach will facilitate network improvements without undermining historic properties due to the limited nature of the exclusion.[41]

## V. THE COMMISSION SHOULD CLARIFY THAT THE SHOT CLOCK APPLIES TO DAS AND SMALL CELL DEPLOYMENTS

Commenters support clarification that Section 6409(a) and the Shot Clock apply to DAS and small cell deployments.[42] The record demonstrates that such clarification is necessary because certain jurisdictions believe that the Shot Clock does not apply to DAS and other small cell deployments.[43] Absent clarification, one can expect these jurisdictions may continue to deny these deployments the benefits of the Shot Clock and, based upon the antipathy to Section 6409(a) evidenced in many of their comments, are likely to take the same approach with Section 6409(a).

## CONCLUSION

The record demonstrates that the Commission should amend its rules and clarify terms set forth in Section 6409(a) so as to expedite wireless infrastructure deployment. Specifically, the Commission should (i) exempt temporary towers from the public notice requirement associated with tower registrations, (ii) clarify certain provisions of Section 6409(a) to eliminate

[41] For similar reasons, CTIA also supports the proposal to exclude these facilities from Tribal review. *See* Verizon Comments at 21-22.

[42] *See* CTIA Comments at 21-22; ExteNet Comments at 7; Fibertech Comments at 33-34; PCIA Comments at 55-56; Sprint Comments at 12.

[43] *See* Eugene Comments at 16-17; Fairfax County Comments at 27-28.

uncertainty, (iii) revise the existing collocation and new build Shot Clocks, and (iv) clarify that DAS and other small cell deployments are covered by Section 6409(a) and the Shot Clock.

Respectfully submitted,

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